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CONTAINING

CASES DETERMINED BY THE CHIEF COURT OF THE PUNJAB AND THE FINANCIAL COMMISSIONER, PUNJAB, AND OTHER LEGAL MATTERS.

EDITED
BY

DHARM DAS SURI,

VAKIL, HIGH COURT, NORTH-WESTERN PROVINCES, AND PLEADER, CHIEF COURT, PUNJAB.

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Constitutional Monarch.—It must not be supposed that the King of England is by law a constitutional monarch. Under the laws of England, the King up to this day enjoys very high privileges and prerogatives. Under the written constitution, the King is the Chief Executive. He has co-ordinate powers of legislation and can veto the Bills passed in Parliament. He can call, prorogue, dissolve Parliament. He can appoint or discharge Ministers at his will. He can raise or disband the army and navy and holds supreme command over them. He is the "Fountain of Honour," and can create Peers and confer titles, dignities and offices of all kinds. He is the head of the National Church and controls the clergy. He is the only legal Sovereign known to the Foreign powers and has the sole right of accrediting or receiving ambassadors, of entering into offensive or defensive alliances, of making treaties or of declaring war or peace. In contrast to these direct statutory powers there are but a few indirect statutory limitations to them. Of these latter kind the most prominent are that he cannot keep a standing army in time of peace without consent of Parliament or suspend laws or dispense with their operation. These were the only limitations imposed by the Bill

of Rights. To these the Act of Settlement only added the independence of the Judges by making them removable only by a vote of both Houses of Parliament and not at royal pleasure, as before. The Act of Settlement further settled the succession to the throne of the Hanoverian Kings but in no other respect imposed any limitations on the royal prerogatives, the abuse of which had brought about the Revolution of 1688.

The process by which the prerogatives of the Crown have, since the Revolution, been brought under constitutional control is matter of long history. But without entering into any details it may safely be said that the most effective of this control is financial. The King has since the Revolution been deprived of the power of appropriation or expenditure of revenue and is now dependent on an allowance called the Civil List for his personal expenses and the expenses of the royal household. He has no power to maintain the army or navy except by the annual vote of the House of Commons, nor can his officers maintain discipline in the army or navy except under the Mutiny Act, passed annually by Parliament. These are no doubt very effective checks over the high privileges and prerogatives of the Crown enumerated above. But still experience has shown how a monarch like George III, determined to rule as a King, could set the authority of the Parliament at nought and played with the ministers and the political parties as he liked. With another monarch, the means to an end, may not be a wholesale corruption of the Commons, but it may be some pretence for the glory of national arms which has, at all times and ages, paid with the populace. The rights of the Sovereign to dissolve Parliament, to discharge Ministers, to create Peers, are such potent factors in the constitution of England that they may any day be exercised, for good or evil, by an ambitious King to establish a personal rule. Mr. Gladstone with all his regard for the constitution was conscious of the rocks ahead and observed in his Gleanings of Past Years:—" It will be an evil and a perilous day for the monarchy were any prospective possessor of the Crown to assume or

claim for himself final, or preponderating, or even independent power, in any one department of State." But it may equally be a perilous day for the constitution of England. But England has been singularly fortunate in her late lamented Sovereign and to have now in Her successor a King whose ambition it is to be a constitutional monarch in the strictest sense of the word. His Majesty has watched the working of the constitution and the political life of his people during the better part of the last half century and his determination is, no doubt, the dictate of his wisdom. He is sure to be as good a King as his mother was a Queen.—*Weekly Notes, Calcutta.*

REVIEWS.

Comments on the Indian Penal Code, by Lala Lal Chand, M. A., *Vakil, High Court, Allahabad, and Pleader, Chief Court, Lahore. Printed at the Mufid-i-Am Press Lahore. Price Rs.* 10.

Lala Lal Chand has rendered good service to the profession and to the Bench by publishing his Comments on the Indian Penal Code. The book consists of 843 pages of closely printed matter, and the notes are clear, succinct and exhaustive. The comments were originally written by the author, for the students of the Law School at Lahore, when he held the office of Law Reader. We have no doubt the student community will welcome it. A large number of Criminal cases published in the Punjab Record is given.

The work is well executed and we have no hesitation in recommending it as a most valuable addition to the lawyer's library of reference.

The Indian Court Fees Act, by Lala Dhanpat Rai, B. A. L.L. B., *Pleader, Chief Court, Punjab,* and *Law Reader, Punjab University. Printed at the Caxton Printing Works, Lahore Price Rs.* 2-8.

We have gone through greater part of this book and can safely recommend it as one of the best annotated

editions of the Court Fees Act at present in the market. Cases down to the end of the last year are given. The inclusion of cases decided by the Chief Court, Punjab, makes the book doubly useful to practitioners in this province.

The appendices materially enhance the value of the work. The get up of the book is good. We congratulate the author on the success which he has achieved in what, we believe, is his first venture as a commentator.

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jurisprudence (*Combe* versus *Edwards L. R.*, III P. D., 103 at p. 130) and is recognized in the proviso to sub-section (1) of section 16 A of the Code. Essential jurisdiction is far more important than any other as it has relation to the constitution of the Court. No such question arises in the present case.

Section 16 A provides a remedy in cases of doubt regarding jurisdiction other than essential jurisdiction. Now in the present instance the defendants raised no question about the suit having been instituted at the wrong place. The Munsif raised it himself and heard the arguments of the plaintiffs' pleader. He decided in the judgment that he had jurisdiction. He did not, as far as I can gather from the papers, record any statement that there was any uncertainty and then proceed to entertain and decide the suit. Had he done so his decree could not have been attacked on the ground on which it has been reversed by the Divisional Judge.

It may be contended with reason that in first noticing the question at an intermediate stage and then deciding it in favour of his Court the Munsif has substantially complied with the law. If a Court being satisfied that there is ground for uncertainty can validly exercise jurisdiction by merely recording a statement to that effect cannot his adjudication be said to be equally effective if he goes a little further and finds that the doubt is on the whole removed? It would perhaps be too technical to hold otherwise but without going into this point I consider that sub-section (2) of section 16 A furnishes the rule for decision in the present case. Let us take it for granted that the Munsif did not record any statement within the meaning of sub-section (1) the objection was not taken in the First Court. I have shown above that upon sound principles of reasoning the jurisdiction of the Court cannot be said to have been taken away by the act of the Settlement authorities. But waiving this there is in my opinion at least a reasonable ground for uncertainty at the time of the institution of the claim as to the Court having jurisdiction in respect of the same, and the Divisional Judge therefore

should not have allowed the objection. I accept the appeal, set aside the decree of the Divisional Judge, and return the case to him under section 562, Civil Procedure Code, to dispose of the appeal on the merits. Court fee on the petition of appeal to be refunded. Other costs to abide the event.

Cause remanded.

APPELLATE SIDE. No. 26.

Before Mr. Justice Rattigan.

BURA and another,—(DEFENDANTS),—APPELLANTS,

Versus

JHANDA and another, minors, through *Mussammat* BANO,—(PLAINTIFFS),—RESPONDENTS.

Case No. 1119 of 1898.

Civil Procedure Code 1882, *Sections* 13 *and* 43—*Suit for possession of land as Khewatdar without claiming shamilat.*

Held, that a decree for possession of land in favor of plaintiffs as *Khewatdars* impliedly included proportionate share of *shamilat* although no claim was specifically made in respect of it.

In partition proceedings objection was taken that the decreeholders had no right to a share in the *shamilat* and they were referred to a regular suit, *held*, that the suit brought by the decree-holders was not barred by section 13 or section 43 of the Code of Civil Procedure.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated the 17th May 1898, reversing the order of Rai Harnam Dass, Munsif, 1st class, Amritsar, dated the 14th January 1898, dismissing claim.

Maulvi Ahmad Din, Pleader, for appellants.

Mussammat Bano, Guardian, for respondents.

JUDGMENT.

9th July 9100. RATTIGAN, J.—Plaintiffs and defendants are representatives of two families who originally owned each a half share of *Patti* Dadan, *Mauza* Mandiala in the Amritsar District. It appears that for some very

considerable time, previous to 1864, plaintiffs' ancestors had been absentees, but that in that year some of them returned and instituted a suit against the ancestors of the defendants, praying for possession of their original half share, amounting to 19 *ghumaos* of land. The claim was contested, but the dispute was eventually referred to arbitration and as a result, a compromise was arrived at under the terms of which plaintiffs agreed to accept 7 *ghumaos* of land (of which 3½ were to be culturable and 3½ *banjar*) and to relinquish the rest of their claim. An award to this effect was made by the arbitrators and was followed by a decree of the Court dated 12th May 1864. In 1896 the village *shamilat* was divided, 202 *kanals*, 7 *marlas* falling to the share of *Patti* Dadan, and shortly thereafter, plaintiffs applied for partition of the latter. Their application was opposed by defendants who denied that plaintiffs had any share in this land, and plaintiffs were referred to a regular suit to establish their rights. They have accordingly brought the present suit in which they claim possession of 101 *kanals*, 3½ *marlas*, being the half of the *shamilat* that fell to the share of *Patti* Dadan.

The First Court dismissed the suit as barred by sections 13 and 43 of the Civil Procedure Code, inasmuch as the present claim should have been included in the suit brought by plaintiffs' predecessors in 1864. On appeal the learned Divisional Judge held that plaintiffs were entitled to a decree for possession of a share in the *shamilat*, proportionate to their holding of 7 *ghumaos*, his decision being based on the ground that plaintiffs' "predecessor attained the position of a *khewatdar* in 1864" and had never since lost it, and that when a decree was given in his favour, "his *status* was made that of a full proprietor and not of a *malik qabza* and with his *khewat* would go the appurtenance belonging thereto." By an obvious oversight, however the learned Judge while holding that plaintiffs were entitled to a share of the *shamilat*, proportionate to their holding of 7 *ghumaos*, concluded with the words "I accept the appeal and grant *the decree prayed for.*" In consequence a decree was drawn up granting plaintiffs'

possession of the half of the whole *shamilat* of the *patti* in accordance with the prayer of their plaint.

Defendants have appealed to this Court, but after hearing the learned pleader who appeared for them, I am of opinion that the decision of the Divisional Judge is correct.

It is not denied that in 1864 plaintiffs' predecessors sued for possession of the half share of the holding that originally belonged to them as owners, and it is clear that the object of the suit was to establish their rights as full proprietors. The contention between the parties was whether or not the then plaintiffs had lost their original proprietary rights, and there could at the time have been no question that, if the plaintiffs established those rights, they would be entitled to not only full proprietary possession of the half of the *khewat* but also to everything that was appurtenant thereto. The plaintiffs did not succeed in obtaining the whole of the half share claimed by them, but they were given 7 *ghumaos* which they accepted in settlement of their claim. These 7 *ghumaos* were given to them as full proprietors, and in respect of them they have remained *khewatdars* ever since. It is difficult to understand on what ground they, though *khewatdars*, are now disentitled to put forward a claim to a share of the *shamilat* which has fallen, after division, to the portion of the *patti* in which they are full proprietors. As laid down in No. 52 *P. R.*, 1866, when a person is found to be owner of a holding in a village, the *presumption* is that he is entitled to a share in the common land. Defendants, however, contend that as plaintiffs' predecessors did not, in 1864, *expressly* claim a share in the *shamilat* and as they accepted 7 *ghumaos* in full settlement of their claims, it must be inferred that they relinquished any right to prefer any such claim thereafter. But I do not see that plaintiffs' predecessors were bound to *expressly* claim that to which their claim, as laid, would, if successful, *impliedly* and (as I think) necessarily entitle them. As representatives of the original proprietors they were suing to recover proprietary possession of the ½ share of the *khewat* to which the *shamilat*

was appurtenant, and it was, in my opinion, not necessary for them to expressly claim anything else than their proprietary right in the *khewat*.

In *Parem Chand* versus *Sardara* (No. 10 *P. R.*, 1894) it was held (though, no doubt, the decision was to some extent based on the provisions of the *Wajib-ul-arz*) that, the purchase of a *khewat* carried with it, as appurtenant to it, a proportionate share of the *shamilat*, and in *Baju Shah* versus *Hukma* (No. 42 *P. R.*, 1897), the learned Judges, while agreeing with the opinions expressed in *Fazal Shah* versus *Sikandar Ali*, (No. 115 *P. R.*, 1894), and in *Maluk Singh* versus *Muhammad* (No. 65 *P. R.*, 1889), to the effect that a share of a proprietor in the *shamilat* should not be treated as a *mere accessory* to the land separately held by him, observed that "from this it does not follow that his right in the *shamilat* is not part of his interest in the village, and that his whole interest in the village does not include such right." For these reasons, I am of opinion that the plaintiffs' predecessors were under no obligation in 1864 to expressly sue for a share in the *shamilat* in addition to their claim for possession as *khewatdars* of part of the holding, and that when the 7 *ghumaos* were awarded to them, they became in respect of such land full proprietors with a right to the enjoyment of every thing appurtenant to their holding.

I would, therefore, hold that the suit as now laid is not barred by reason of section 43, Civil Procedure Code, even if that section could otherwise be applied. But I am more than doubtful whether sections 13 and 43 could, in any case, have any applicability as the Civil Procedure Code of 1859 was not in force in the Punjab in 1864 when the previous suit was instituted and decided.

The decision appealed from is, in my opinion, correct but the decree of the Divisional Court has (as I have already pointed out) been erroneously drawn up. I, therefore, so far accept the appeal as to alter the decree into one granting plaintiffs' possession of a share of the *shamilat* of *patti* Dadan proportionate to their holding of 7 *ghumaos*. Under all the circumstances I leave the parties to bear their own costs of this appeal.

Appeal accepted.

APPELLATE SIDE. No. 27.

Before Mr. Justice Robertson and Mr. Justice Maude.

BALDEO DAS, Vendor, BIHARI LAL, and others, Vendees, } DEFENDANTS, APPELLANTS,

Versus

PIARE LAL,—(PLAINTIFF),—RESPONDENT.

Case No. 786 of 1898.

Pre-emption—Sale for a special object—Bona fide transaction

Where land was *bona fide* sold for the purpose of erecting a *dharmsala* and the sale-deed recited that the sale shall be set aside in case the purpose for which the land was sold, *i. e.*, the erection of a *dharmsala*, was not carried out, *Held*, that the pre-emptor could not be allowed a decree for pre-emption.

The Court observed "We are by no means prepared to say that if a vendee, especially anxious to secure certain property says 'your price is so much, but in order to obviate pre-emptive claim I am prepared *bona fide* to add a certain sum, and pay it *bona fide* as the price of any preference so that pre-emptive claims may be rendered less likely' and actually does so, a pre-emptor would be entitled to oust the vendee for any less sum than that actually paid," and further "The right of pre-emption is one to be interpreted strictly. It is not one which gives a pre-emptor a right to force a transfer from a vendor on terms which are quite unacceptable to the vendor, and, in general, a pre-emptor must abide by the terms which have been *bona fide* offered to, and accepted by, the vendee whom he wishes to oust".

Further appeal from the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated the 22nd *April* 1898, *reversing the order of Sheikh Khuda Bakhsh, Khan Bahadur, District Judge, Delhi, dated the* 5th *January* 1898.

Mr. Madan Gopal, Advocate, for appellants.

Babu K. P. Roy, Pleader, and *Mr.* S. P. Roy, Advocate, for respondent.

JUDGMENT.

29th Novr. 1900 ROBERTSON, J.—During the hearing of the appeal we intimated that in our opinion there was no proof of

any sale having taken place before the date of the execution of the registered deed of sale dated 2nd September 1896, and we have accordingly now only to decide whether the plaintiff could be allowed a decree for pre-emption in face of the condition in the deed which recites that the sale shall be set aside in case the purpose for which the land in question was sold, *i. e.*, the erection of a *dharamsala* was not carried out.

To clear the ground we must at once say that we are convinced that the *bona fide* intention of both parties to the transaction was that the land should be sold and bought for the purpose of the erection of a *dharamsala*. This does not seem to be seriously contested now, and whether it be contested or not we consider it well established.

It is however contended for the respondent that even if it were so the condition arranging that the sale should be cancelled on failure to fulfil this condition was not one really intended to be acted upon, but was put in merely with a view to defeat the rights of the pre-emptor. Now the deed itself is a perfectly clear and straightforward one, and one which *prima facie* must be taken to express the true intentions and objects of the parties. The parties are both of the same caste and sub-division. The deed recites that no convenient *dharamsala* exists for them, the vendor desires to sell, and the vendee desires to buy for the purpose of building a *dharamsala* and after reciting this fully in the main portion of the deed a further clause is added which provides that if this condition is not fulfilled the sale will be cancelled. It is suggested that the clause was put in at the vendee's suggestion to defeat pre-emptive claims and we were asked to assume that if this were so it was not binding on the pre-emptor. This we are unable to accept, no doubt when a fictitious entry is made for this purpose it would not be binding on a pre-emptor as in the case when a sum is entered as the purchase money in excess of the price really paid. But we are by no means prepared to say that if a vendee, especially anxious to secure certain property, says "Your price is so much but in order to obviate pre-emptive

claims I am prepared *bona fide* to add a certain sum and pay it *bona fide* as the price of any preference so that pre-emptive claims may be rendered less likely " and actually does so, a pre-emptor would be entitled to oust the vendee for any less sum than that actually paid. So here no doubt both parties were anxious that the land should be used for a *dharamsala* only, and were desirous of resisting claims for pre-emption. To secure the accomplishment of their object both *inter se* and against all comers, they entered certain conditions. If those conditions were *bona fide* ones, if the promise to build the *dharamsala* or return the land formed as it were *bona fide* part of the price, was it not a perfectly fair and reasonable condition and one which a pre-emptor is bound to respect? Whether the pre-emptor could claim to pre-empt on giving a promise to build a *dharamsala* is a question with which we are not concerned as he distinctly refuses to do so. We can see no reason for assuming that the condition was not a *bona fide* one, the main reason urged for this view being that the vendor's father went bankrupt some 16 months or so later, a fact which we think quite insufficient in itself. The whole deed taken as a whole is reasonable and consistent, and it lay upon the pre-emptor to show that any part of it was really otherwise than a *bona fide* transaction. We think he has quite failed to do so.

As for the contention that the pre-emptor is not bound by the condition in the deed, that the sale will be cancelled if a *dharamsala* be not built because that restriction in the use of the property is in itself a condition which would not be enforced, we are unable to accept it. The parties to the deed themselves are still quite willing to abide by it, and we fail to see anything unusual or illegal in the arrangement. The right of pre-emption is one to be interpreted strictly. It is not one which gives a pre-emptor a right to force a transfer from a vendor on terms which are quite unacceptable to the vendor, and in general a pre-emptor must abide by the terms which have been *bona fide* offered to and accepted by, the vendee whom he wishes to oust. These

we find on the facts, that a vendor has in good faith sold his land for a certain specific purpose on certain specific terms to a vendee who is ready and willing to carry out his share in the contract, a third person wishes to oust the vendee and obtain the land, in effect without paying a portion of the price, and that portion the non-payment of which was under the terms of the sale to render it void. We do not think that he can do this under the law of pre-emption as it stands in this province and we accept the appeal and dismiss the suit with costs throughout accordingly.

Appeal dismissed.

APPELLATE SIDE. No. 28.

Before Mr. Justice Clark, Chief Judge and Mr. Justice Reid.

FATTEH SINGH and another—(DEFENDANTS),—
APPELLANTS,

Versus

(1) NIHAL SINGH,—(PLAINTIFF),—
and
(2) BASANT SINGH,—(DEFENDANT),— } RESPONDENTS.

Case No. 429 of 1898.

Custom—Alienation—Power to transfer property inherited from adoptive father.

Held, that under customary law an adopted son does not take an estate in the property of his adoptive father more limited than that which he takes in the property of his natural father, and also that there is no distinction between the right to alienate the property acquired in either case.

Further appeal from the order of A. Kensington, Esquire, Divisional Judge, Jullundur Division, dated the 9th *February* 1898, *modifying the order of Mian Nizam-ud-Din, Additional District Judge, Jullundur, dated the* 29*th October* 1897.

Mr. Madan Gopal, Advocate, for appellants.

Bakhshi Sohan Lal, Pleader, for respondents.

JUDGMENT.

REID J.—The plaintiff respondent sued for a declaration that a sale, for Rs. 800 of land inherited by 14*th Decr.* 1900

the vendor from his adoptive father, a collateral of the plaintiff, did not affect the reversionary rights of the plaintiff.

The Court of First Instance found that Rs. 545 were raised for necessary purposes and constituted a charge on the estate.

The Lower Appellate Court reversed this decree except as to Rs. 200 admitted by the plaintiff to have been raised for necessity, on the ground that, although the vendor might have required the whole or part of the Rs. 800 for expenses of his own and for payment to a creditor it was admitted that he owned a share with his brothers in an ancestral holding of his own in a village about a mile from that in which the land in suit is situate, besides a share in an occupancy holding in another village, and that under these circumstances he was not justified in saddling land, in which he had a life interest only, with his personal debts, even supposing them to be proved.

No authority has been cited, either by the learned Divisional Judge or by the pleader for the respondent, for the proposition that under customary law, which admittedly governs the parties, an adopted son takes an estate in the property of his adoptive father more limited than that which he takes in the property of his natural father, or for the proposition that any distinction between the right to alienate the property acquired from either father can be drawn.

The pleader for the respondent referred vaguely to Hindu law, but no analogy can be drawn from that law, inasmuch as an adopted son usually loses his rights in his natural family, unless he is a *dwyamushyayana*, in which case the adoptive father is almost invariably the brother of his natural father.

Under customary law the right to alienate ancestral property is limited, and the rules of limitation are the same whether the property dealt with comes from a natural, or an adoptive father.

In neither class of property has the son "a life interest only" if those words are used as signifying the estate

of a tenant for life, although it is true that he cannot, except under certain circumstances, alienate for a period extending beyond his own life. The only distinction which exists, between the estates of the adopted son in the two classes of property, is with reference to the devolution of each on his death, childless and without a widow. In that event the male collaterals through the natural and the adoptive fathers take the property derived from those fathers respectively. In suits of the description under consideration the rights of the alienee must be considered. His duty is to ascertain whether money is required for necessity, in the sense in which that word has been interpreted under customary law, and it is not his duty to ascertain on which of two funds the sum required for that necessity is to be a charge. We cannot import a doctrine akin to marshalling into the customary law on this subject.

We cannot hold that the custom, apparently set up by the learned Divisional Judge for the respondent has been established, and it is necessary to consider what portion, if any, of the balance of the sale consideration was raised for necessity or is binding on the reversionary right of the respondent as a collateral of the alienor, treating the property acquired by the latter from his natural and adoptive fathers as one estate, chargeable with debts which bind the estate in the hands of collaterals after the death of the alienor.

We set aside the decree of the Lower Appellate Court, and, under section 562 of the Code of Civil Procedure, we remand the appeal to that Court for disposal on the merits, with reference to the above remarks.

The Court fee on the memorandum of appeal will be refunded and costs will be costs in the cause.

Cause remanded.

Appellate Side. **No. 29.**

Before Mr. Justice Chatterji.

Mussummat INDI,—(Defendant),—APPELLANT,

Versus

BHANGA SINGH and others,—(Plaintiffs),—
RESPONDENTS.

Case No. 496 of 1898.

Widow Marriage Act 1856, *Section* 2—*Widow marrying her husband's brother—Forfeiture of her right to her husband's estate—Customary law—Jats of Ferozepur District.*

Where widow marriage was recognized by custom among a particular community previous to the passing of Act XV of 1856, section 2 of the Act was not intended to lay down a rule whereby the widow forfeited the right which she had by custom in her husband's estate.

Found, that by custom among Jats of the Ferozepur District, a widow marrying the brother of her deceased husband does not forfeit the estate which she inherits from her husband.

Further appeal from the order of H. Scott-Smith, Esquire, Additional Divisional Judge, Ferozepur Division, dated the 5*th March* 1898, *reversing the order of Pandit Nand Lal, Munsif, 1st class, Fazilka, dated the* 24*th December* 1897, *dismissing plaintiff's claim.*

Appellant, in person.

Mr. Ganpat Rai, Advocate, and Bhanga Singh, in person, for respondents.

Judgment

13th July 1900. Chatterji, J.—The facts of this case are very simple. The defendant *Mussammat* Indi is said by the plaintiffs to have married the co-defendant, Nanda Singh, her husband's brother, and they sue for their shares of his property alleging that such marriage works forfeiture and Wazir Singh, the late husband of *Mussammat* Indi, had three brothers of whom plaintiffs represent two and Nanda Singh is the third. The plaintiffs claim two-thirds of Wazir Singh's land,

Both *Mussammat* Indi and Nanda Singh deny the *Karewa*, but admit that there was an illicit intimacy between them which resulted in *Mussammat* Indi becoming pregnant by Nanda Singh, and bearing ~~him a~~ daughter, now dead. The Courts below concurrently find the *Karewa* proved, and having regard to the evidence and to the custom of the Jats, and the fact that Nanda Singh is the *dewar* of *Mussammat* Indi, and that there was co-habitation between them and issue born in consequence, I think there was at least a valid customary marriage, between them. See *Lachu* versus *Dial Singh* 30 *P. R.* 1896 and No. 73 *P. R.*, 1897. I think the Lower Courts finding on this point must be upheld.

The question then for decision is whether the marriage of a Sikh Jat woman with her husband's brother, who is the next heir or one of the next heirs, works forfeiture of her former husband's estate.

The Courts below have differed in their views—the First Court held the custom established by the evidence—while the Divisional Judge was of opinion that the female defendant appellant before me, had failed to prove any custom forming an exception to the well-known rule that on re marriage a widow loses her first husband's property. A fresh inquiry was ordered by this Court and the return of the Munsif is in favour of appellant. The Divisional Judge has not given any opinion on the evidence taken on remand.

I do not think the provisions of section 2, Act XV of 1856, on which the Divisional Judge lays some stress have any application to the present suit—*Harsarn Das* versus *Nandi I. L.R., XI Allahabad*, 330. Among the parties to this case widow marriage was valid by custom before that Act was passed and the words of section 2 do not affect the incidents of such custom.

The Lower Court has made as full an inquiry as was possible under the circumstances, the parties owing to the hard times not being able to afford much expense in procuring instances or in producing evidence. It considered a fairly large number of instances, *viz.*, twelve for the plaintiffs, *vide* list A, and ten for the defendant, list B. It thought that instances where the widow did not

claim or where the second husband being unmarried had no family by another wife and the widow was not necessitated to keep her hold over her former husband's property are not of much value. On the whole it was of opinion that the instances preponderated in defendant's favour although they included some from the Sirsa District. This in the Court's opinion was immaterial as the persons concerned were all Sikh Jats, those of Sirsa being generally immigrants from the Ferozepore District and the neighbouring localities and intermarriages and ties of brotherhood being most common among them. This is to a great extent borne out by Mr. Wilson's Settlement report of the Sirsa District, para 79. He states that the immigration took place within the last seventy years. The custom of Sirsa Sikh Jats, therefore, is relevant to the inquiry before us.

Of the twelve instances cited for the plaintiffs two are unverified and in one case the first husband predeceased his father. They must be excluded from consideration. In eight cases there was no dispute and in one the deceased husband left three brothers one of whom married the widow and one of the remaining two sued and got a decree for his one-third share. It does not appear whether the other brother also got his share or the widow was allowed to keep the two-thirds that remained and whether the brother who married her had another wife and family, but the judgment shows that the widow did not produce any evidence. There is also an old instance, a judgment of the Tehsildar, dated 23rd August 1879, in which a decree was passed against the widow by reason of *Karewa* with her husband's brother in favour of another brother to the extent of one half, the other half the share of her second husband, who did not make any claim being left with her and declared to be sufficient for her maintenance.

Out of the ten instances relied on by the defendant, *Mussammat* Indi, three are from the Sirsa District. In one the second husband was a near collateral and apparently he was the person entitled to claim the land but did not. In another from Lambi in the Sirsa District there was

a claim by the other brothers, but the Tehsildar on 21st October 1880, following a judgment of the Deputy Commissioner on appeal in a previous case dismissed the claim for the widow's lifetime. The Deputy Commissioner whose judgment is dated 29th November 1895, had held in concurrence with the Lower Court that re-marriage with a near relation of the husband did not work forfeiture. Two other from the Mukatsar and Fazilka Tehsils of the Ferozepore District came up to the Chief Court which held upon a consideration of the whole evidence that by custom the widows did not forfeit their first husband's estates under the circumstances and dismissed the claims, *vide* judgment in *Punjab Singh*, &c., *versus Mussammat Chandi*, &c., Civil Appeal No. 42 of 1897.

In *Prema versus Mussammat Pirdhan* No. 137 *P. R.*, 1883, it was found after a fresh inquiry into custom on remand that no forfeiture was entailed by the widow remarrying her husband's brother and an opinion partially to the same effect was expressed in remanding the case for further inquiry in *Hira Singh, versus Mussammat Rami* No. 74 *P. R.*, 1893. On the other hand in *Mussammat Ramon versus Baisakha Singh* No. 90 *P. R.*, 1889, it was held that remarriage with a near collateral does not make an exception to the ordinary rule of forfeiture. This was a case from the Ferozepore District, but as pointed out in Civil Appeal No. 42 of 1897 there is a considerable difference between remarriage with a near relative of a deceased husband and remarriage with the deceased husband's brother. It was also admitted that the widow had left first husband's house which was an inportant element according to the respectable witnesses examined in that case and in *Hira Singh versus Mussammat Rami* (No. 74 *P. R.*, 1893) under custom in determining the question of forfeiture. The last precedent is therefore not quite apposite to the present case.

The decision of the question is not free from difficulty, but on the whole I am disposed to think that the plaintiff's claim ought not to succeed. Having regard

to the customs and notions of the Jats. I am inclined to hold that there is a substantial distinction recognized by them between the marriage of a widow with her husband's brother and her marriage with a stranger. The Jat notion undoubtedly is that by marrying a member of the family a woman not only becomes a member of the family but as one belonging to the family. If her husband dies his male relations in the order of propinquity to him have a preferential claim to take her to wife. In practice in most instances she follows this rule if she contracts a second marriage at all. Where she takes the liberty of choosing a husband elsewhere it is usual for the next relative of the deceased to institute a Criminal prosecution under section 498, Indian Penal Code, or sue for her custody on the allegation that a *Karewa* has actually taken place with him. Such proceedings fail because our Courts refuse to recognize the mere sentimental claims of the male relation as binding on the woman without proof of an actual marriage whether by ceremonies or a distinct declaration or continued cohabitation in the avowed character of husband and wife.

Among Jats also no ceremonies are essential to a widow's remarriage but this is more specially the case where the second husband is the brother of the first. By mere cohabitation the widow assumes the position of his wife and he of her husband. See remarks in *Hira Singh versus Mussammat Rami* No. 74 *P. R.*, 1893, at p. 318. This must be due to the universal opinion held by Jats that in marrying her husband's brother the widow is doing the right and proper thing and what she is expected to do. It is allowable then to infer that as regards forfeiture there would be some differentiation between the consequences of an act of this nature and those of a *Karewa* out of the family. The estate of the widow is only for life and is primarily given to her by way of maintenance. She gets this as a member of the family and loses it if she leaves the family for another. Would she be subjected to the same penalty if she continues a member of the family as before in spite of her re-marriage? Probably custom which is founded on